No. 77-674

In the Supreme Court of the United States

OCTOBER TERM, 1977

M/V TAMANO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. On July 22, 1972, the M/V TAMANO, a Norwegian oil supertanker, grazed a ledge in Hussey Sound, Casco Bay, Maine. As a result, 100,000 gallons of heavy oil were spilled into Casco Bay (Pet. App. 44a).

At the time of the collision, the TAMANO was piloted by Captain Charles Dunbar of Portland Pilots, Inc.[1] The incident resulted in numerous law suits. This case involves only the question of the liability for clean-up costs.

The district court entered a judgment against the United States, concluding that the accident had been caused by a negligently-placed buoy (Pet. App. 1a-42a). The court of appeals reversed, holding that the buoy was

[1]Dunbar boarded the TAMANO at the Portland Lightship to act as pilot through the Sound.

on station and that the sole cause of the accident was negligent navigation by Dunbar (564 F. 2d 964; Pet. App. 43a-85a). It concluded that the district court's contrary findings were clearly erroneous. On petition for rehearing, the court of appeals wrote a brief opinion rejecting the argument that it had impermissibly substituted its judgment for that of the district court (Pet. App. 86a-90a).

2. The court of appeals exhaustively examined all the evidence in this case. Its conclusion that the findings of the district court were clearly erroneous is correct and based on the analysis of all evidence of record. We rely on its opinion. There is no reason for review by this Court, because the case involves only the application of settled principles to particular facts (see Pet. App. 70a-71a).

Petitioners say that the court of appeals reweighed the testimony of Bos'n Hanssen. But this testimony was before the court on deposition, and neither the district court nor the court of appeals resorted to assessments of demeanor. Moreover, the court of appeals correctly observed that the reasons given by the district court for rejecting this eyewitness testimony simply were not supported by the record (Pet. App. 48a-64a). Petitioners do not come to grips with the court of appeals' discussion. As the court of appeals wrote on denying rehearing (Pet. App. 90a): "Counsel successfully persuaded the district court to ignore Hanssen's testimony by supplying a number of grounds, all of which we examined, discussed at length, and demonstrated to be unfounded. The petition conspicuously fails to fault that analysis. There is, accordingly, no reason to ignore Hanssen."

The court of appeals also pointed out that, if the buoy had been misplaced, the pilots surely would have observed

the problem before the night of the accident (Pet. App. 67a; footnote omitted):

> Buoy 6 [the buoy struck by the TAMANO] was the focal point of the turn which was, by common agreement, the most critical part of the passage. Portland Pilots were so conscious of its importance that they had sought the change from its pre-1967 location in precise terms, viz., easterly, 150 feet. Buoys 6 and 7 were the signposts and gateposts, of the channel. A 215 foot southeasterly change [two days before the collision] from Buoy 6's new position, if effected, would have been a second 150 foot movement easterly, when the first had been determined to be the maximum permissible, and 150 feet southerly, increasing its distance from Buoy 7 by 15%. If a 150 foot easterly movement effected an appreciable change in the curve, a second 150 feet would also seem appreciable.

3. The court of appeals also correctly rejected petitioners' contention that Dunbar, as a compulsory pilot, was a "third party" for whose negligence petitioners are not responsible under 33 U.S.C. (Supp. V) 1321(f)(1).[2] The court correctly stated that "unless the exceptions are narrowly construed, the legislative purpose would be largely vitiated" (Pet. App. 82a). No legislative history suggests that a pilot, in the ship's employ and having full control of the ship, can be deemed a "third party," in essence a stranger to the ship. The pilot is no more a third party than is the ship's captain. Someone must be in

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[2]33 U.S.C. (Supp. V) 1321(f)(1) provides that a ship owner or operator is liable to the United States for the actual cost of removing a discharge of oil, unless the discharge was caused "solely by * * * an act or omission of a third party * * *."

charge of the ship at all times. At the time of the accident, Dunbar—a temporary employee—was in charge. The ship and its owners are therefore liable for the costs of cleaning up the oil.[3]

However that may be, no other court of appeals has considered this question. We have no reason to believe that accidents like the present one, caused by a pilot, occur frequently. There will be time enough for review by this Court if a conflict among the circuits should develop concerning liability under Section 1321(f)(1) for the pilot's negligence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

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[3]It is an accepted principle of admiralty law that a vessel is responsible for harm caused by the negligence of a compulsory pilot. See *The China*, 7 Wall. 53. See generally Comment, *The Compulsory Pilot Defense: A Reexamination of Personification and Agency*, 42 U. Chi. L. Rev. 199 (1974). In the court of appeals, petitioners conceded that the TAMANO itself was responsible for cleanup costs (Pet. App. 82a). Although petitioners apparently seek to withdraw that concession (Pet. 8), it is too late to do. Because there is no contention that the cleanup costs exceed the value of the TAMANO, there is no reason to consider the allocation of personal liability for the excess.

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